Supreme Court, U.S.
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No. 91-1800

THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

IN RE: HARLOW FAY, INC.,

Debtor.

HARLOW FAY, INC.,

Petitioner,

v.

FEDERAL LAND BANK OF ST. LOUIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENTS BRIEF IN OPPOSITION

Attorney for Respondent:

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LIST OF PARTIES

The parties to this action are as follows:

The Petitioner is Harlow Fay, Inc., Box 102, LaClede, Missouri 64651.

The Petitioner's Attorney in this Court and below is William L. Needler of William L. Needler & Associates, Ltd., Airport Road, P.O. Box 177, Ogallala, Nebraska 69153, Phone (308) 284-4505; and 8 South Michigan Ave., Suite 1300, Chicago, Illinois 60603, Phone (312) 236-4505.

Below Petitioner was also represented by local counsel: Jackie Bailey, 116 West Ritchie, Marceline, Missouri 64658.

The Respondent is Federal Land Bank (Farm Credit Bank) (AgriBank, FCB), 1415 Olive St., St. Louis, Missouri 63101.

The Respondent's Attorney is Charles

E. "Sketch" Rendlen, III, P.O. Box 1255, 800 Broadway, Hannibal, Missouri 63401.

An interested party is Farmers Home Administration, #1 Fairground Road, Brookfield, Missouri 64628.

Farmers Home Administration is represented by the U.S. Attorney, United States Court House, 1114 Market St., St. Louis, Missouri 63101.

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STATEMENT OF THE CASE

Appellant-Petitioner, Harlow Fay, Incorporated defaulted with respect to a confirmed Plan under 11 U.S.C. Section 1112(b)(8) of the Bankruptcy Code and his Chapter 11 proceedings were dismissed (Appellant-Petitioner's Appendix 1). Debtor had been ordered to submit a Modification to his Plan no later than December 6, 1988 (Appellant-Petitioner's App. 2). Debtor failed to prepare and submit the Modifications (Appellant-Petitioner's App. 3). Debtor attempted to file an untimely Modification almost a week later, and on December 13, 1988 attempted to modify the Modification (Appellant-Petitioner's App. 3). Debtor's untimely efforts to modify became moot with the dismissal of the Chapter 11 on December 13, 1988 (Appellant-

Petitioner's App. 1).

Debtor appealed to the U.S. District Court on January 12, 1989 The Brief of the Debtor, now Appellant-Petitioner, was due February 22, 1989. On February 22, 1989, Appellant-Petitioner filed a request for an Extension of Time in which to file his Brief. A three week extension was granted, to and until March 13, 1989.

On March 7, 1989, Appellant-Petitioner filed a second Motion for an Extension, this time requesting an additional two weeks. This Motion was also granted, giving Appellant-Petitioner until March 27, 1989 to file its Brief.

On March 27, 1989, Appellant-Petitioner filed yet another Motion requesting an extension until April 17, 1989 to file his Brief. This Motion was also granted. April 17, 1989 passed

without word from Appellant-Petitioner, but two days later Appellant-Petitioner sought another extension of time in which to file his Brief. Appellant-Petitioner's Fourth Request for an extension of time was to the non-existent date of April 31. Appellant-Petitioner filed a Brief May 3. The Appellee (FLB) filed a Motion to Dismiss. The District Court denied this untimely Motion and dismissed Debtor-Appellant's Appeal on May 5, 1989. (Appellant-Petitioner's Appendix 9)

Appellant-Petitioner's Motion to reconsider the dismissal was denied. Appellant-Petitioner's Motion for a stay pending Appeal was denied. Appellant-Petitioner filed a Notice of Appeal in the District Court Clerk's office January 15, 1991. Appellant-Petitioner failed to follow the Rules regarding preparation of

the Record and Appendix in this case (Appellant-Petitioner's App. 4).

United States Court of Appeals for the Eighth Circuit affirmed the Judgment of the District Court dismissing the bankruptcy Appeal for failure to timely file a Brief. In Re Harlow Fay, Inc. (Harlow Fay, Inc. v. Federal Land Bank of St. Louis, 951 F.2d 175 (8th Cir. 1991) A Petition for Rehearing was denied February 6, 1992.

ARGUMENT

I. THERE IS NO CONFLICT OF DECISIONS

The issue in this case is narrow and unique to its facts no amount of rhetoric can transform it into one meriting certiorari. The Appellant-Petitioner claims that the Opinion of the Court of Appeals is in conflict with Harrison v. First Bank, 823 F.2d 1310 (8th Cir. 1987).

This does not appear to be the case. Harrison is consistent with the findings here where excusable neglect was not found when there was turn over of staff in the lawyers office which caused the neglect to occur. In Harrison, only one deadline was missed which was not sufficient to rise to the level of excusable neglect. Here many deadlines were missed. There is no logical way Appellant-Petitioner can claim excusable neglect.

The argument of Appellant-Petitioner that no case where the "excusable neglect" standard is applied to the untimely filing of Appellant's Brief may be due to the fact that jurisdictional requirements mandate a Motion be before the Court to allow the filing of a late Brief. That did not occur in this case because the May 3 Brief filing was beyond the third

requested extension of April 17, which was not acted on, also beyond the 4th Request for Extension of Time to file the Brief to April 31 which was filed two days after the April 17th requested extension. Deadlines were missed repeatedly by the Appellant-Petitioner which he admits in his Brief.

> A. Appellant-Petitioner, after four requests for Extensions of Time, two of which were granted, still failed to timely file a Brief on his Appeal from the Bankruptcy Court.

The Bankruptcy Court and the District Court have the power to dismiss the Chapter 11 proceeding in Bankruptcy. This is conceded by Appellant. The central issue is whether these two Courts abused their discretionary powers by dismissing the Appeal of Appellant-Petitioner. The answer to this is no.

This case has a long history of delay

and dilatory conduct on the part of the Appellant-Petitioner and his counsel. In light of these delays and dilatory conduct, and because Appellant-Petitioner's counsel can show no "excusable neglect", the District Court properly dismissed the Appeal in this case and denied a Motion to Reconsider. The Court of Appeals affirmed the dismissal.

Appellant-Petitioner's Petition in Bankruptcy Court was dismissed on December 13, 1988, following a Hearing before the Honorable David P. McDonald, U.S. Bankruptcy Judge. The record of that Hearing shows that Appellant-Petitioner was required to file a Modification to his confirmed bankruptcy Plan no later than December 6, 1988. An Affidavit sworn to by attorney Needler on December 11, 1988 admits that Appellant-Petitioner failed to

file the Modification in a timely manner. Counsel for Appellant-Petitioner admitted in the Hearing of December 13 that he planned to file a further Modification regarding Federal Land Bank, but no such Modification was ever filed of record nor has it been offered. Further, the untimely Modifications proposed by Appellant-Petitioner in the December 13 Hearing were such that the Bankruptcy Judge rejected them outright by dismissing the case, an act clearly within the discretion of the Court.

One month later Appellant-Petitioner timely filed his Notice of Appeal to the District Court. His Brief was due February 22, 1989. On that date, Appellant-Petitioner requested a three week extension of the filing deadline. His request was granted. Six days before

the Brief was due, on March 7, 1989, Appellant-Petitioner requested another extension of the filing deadline, this time to March 27, 1989. Request granted. On March 27, 1989, Appellant-Petitioner again requested a three week extension of the deadline to April 17, 1989.

Appellant-Petitioner's Brief was now due on April 17, 1989. That date came and went without word from Appellant-Petitioner.

Two days later, on April 19, 1989, Appellant-Petitioner again prayed for an extension - this time to the nonexistent date of April 31, 1989. This request was not timely filed and was denied by Order of the Honorable George Gunn, District Judge, dated May 5, 1989. This same Order dismissed Appellant-Petitioner's Appeal. On December 17, 1991, the Court of Appeals

affirmed the District Court.

Appellant-Petitioner ran out of time. He failed to follow the rules. Federal Rule of Civil Procedure 6 and Bankruptcy Rule 9006 authorize the Court to enlarge the time required for cause in the discretion of the Court, "if the request therefore is made before the expiration of the period originally prescribed or as extended by a previous Order." Appellant failed to timely seek his fifth extension but claims abuse by the Courts.

Appellant-Petitioner argues in his Motion to Reconsider that a Brief filed May 3rd should be considered timely filed when the extension requested was to last until April 30th (31st). Appellant-Petitioner ignores the fact that no such extension existed. The Brief, thanks to three prior Extensions of Time, was due

April 17.

> B. Appellant-Petitioner failed to show excusable neglect as required by Bankruptcy Rule 9006(b)(1)(2) and Federal Rule of Civil Procedure 6(b)(2), and has shown no good cause for his dilatory conduct.

Appellant-Petitioner claims his untimely filings and dilatory tactics should fall under the absolution of "excusable neglect." There is no merit to this claim.

"The excusable neglect standard is intended to be a 'strict one'. Chipser v. Kohlmeyer and Company, 600 F.2d 1061 (5th Cir. 1979). The Fifth Circuit, in Chipser, restricted the use of "excusable neglect" to unique circumstances, such as the "failure to learn of the Entry of Judgment." Id at 1063. There is nothing unique about Appellant-Petitioner's circumstances that warrants reversal due

to counsels "excusable neglect."

Counsel for Appellant-Petitioner recites a litany of hard luck and case pressure to excuse his failures in managing this case. However, none of his excuses rises to the level of "excusable neglect". His Briefs are but an apologia for failure to follow the rules.

Counsel for Appellant-Petitioner says his staff was decimated, leading to his untimely filings and delays. In Hansen v. First Bank of South Dakota, 828 F.2d 1310 (8th Cir. 1987), the Court held that employee turnover such as attorney Needler complains of does not constitute excusable neglect and is considered well within the reasonable control of the attorney responsible for preparation of a Brief.

Appellant-Petitioner alleges confusion from the moving of counsel's office, which

disrupted his office routine and the alleged pressure of business caused his failure to file his Brief on time. This, Appellant-Petitioner claims, constituted "excusable neglect." This exact set of circumstances has been held NOT to be "excusable neglect" so as to render permissible granting of extension of time to file untimely notice. Selph v. Council of Los Angeles, 593 F.2d 881 (9th Cir. 1979)

Attorney Needler, in his Affidavit of May 13, 1989, lists 28 cases which he dealt with between the dates of April 25 and May 2, 1989. Appellee is unsure why this particularly
harried schedule of attorney Needler would be of import in the issue at hand; attorney Needler's Brief in the case at bar was due eight days before his globe-

trotting tour de force recited in his Affidavit. Besides which, as the First Circuit Court of Appeals has said, "most attorneys are busy most of the time and they must organize their work so as to be able to meet the time requirements of matters they are handling or suffer the consequences." Pinero Schroeder v. Federal National Mortgage Association, 574 F.2d 1117 (1st Cir. 1978). (emphasis added).

Since Appellant-Petitioner's Chapter 11 proceeding was dismissed on December 13, 1988, Appellant-Petitioner has filed no fewer than four Motions for Extensions, a lengthy Motion to Reconsider the Dismissal, two emergency Motions for Stay, an Amendment to his Motion to Reconsider, an Affidavit, and the untimely filed Brief of May 3, 1989. As the D.C. Circuit Court

of Appeals noted, "it may properly be commented that the time which Appellant must have occupied in preparing the numerous, voluminous papers which he has filed would have sufficed for the preparation of the Brief itself." Creel v. Creel, 184 F.2d 449, 453 (D.C. Dir. 1950).

Appellant-Petitioner argues that the busy practice of the attorney is excusable neglect. Almost every attorney can argue a busy practice but this does not make it excusable neglect. The Eleventh Circuit has found that a busy practice is not excusable neglect under Federal Rule of Civil Procedure 6(b). Clinkscales v. Chervon U.S.A., Inc., 831 F.2d 1565, 1569 (11th Cir. 1987)

Appellee has stated before, and now believes, that the dilatory tactics and

disregard of the Rules herein fall far short of "excusable neglect". Not one of Appellant-Petitioner's cases cited show such delays and extensions as he was allowed in this case. The claims of attorney Needler must be considered in light of the delays and excuses seen in this case. It is clear that the discretion of the Court allows dismissal. Dismissal will stand as long as there was not an abuse of discretion.

II. THE DISTRICT COURT PROPERLY DENIED DEBTOR-APPELLANT'S MOTION FOR RECONSIDERATION, WHICH WAS AFFIRMED BY THE COURT OF APPEALS AS APPELLANT-PETITIONER HAS SHOWN NO ABUSE OF DISCRETION ON THE PART OF THE DISTRICT COURT.

In the event Certiorari is granted, Appellant-Petitioner cannot prevail due to the fact there can be no abuse of discretion shown at the District Court level or in the affirmation by the Court of Appeals.

In his Brief Appellant-Petitioner apparently confuses his arguments regarding "abuse of discretion" and "excusable neglect". Appellant-Petitioner claims his many time constraints, lack of staff, and the "agony" suffered by farm families should have been sufficient for the District Court to ignore the clear rules of procedure and accept his untimely Brief. Appellant-Petitioner claims it was error for the District Court not to do so. There was no abuse of discretion here, where the District Court dismissed the Appeal of Appellant-Petitioner, after repeated extensions, for failure to file a Brief.

Appellant-Petitioner was given three opportunities to cure his failings. His chief complaint appears to be that the District Court erred by failing to give

him an additional extension, to April 30 (or May 1, depending on which of Appellant-Petitioner's arguments this Court wishes to peruse). His complaint fails to take into consideration that the Brief he ultimately lodged with the Court failed even to satisfy the final, prayed for, extension! His complaint also fails to show any abuse of discretion by the District Court.

The evidence in this case consists of dates on the calendar. A calendar does not lie, nor is it confusing. A Brief filed May 3 cannot be said to have met a deadline of April 17 of the same year. That evidence is clear. It is compelling. The Appellant-Petitioner was dilatory. Appellant-Petitioner failed to prosecute. The District Court properly dismissed the Appeal. The Court of Appeals properly

affirmed the Dismissal.

III. IF CERTIORARI IS GRANTED, APPELLANT-PETITIONER CANNOT PREVAIL BECAUSE IT HAS FAILED TO SHOW ANY REASONS NOT TO UPHOLD THE ORDERS OF THE HONORABLE GEORGE GUNN, DISTRICT JUDGE, AND THE HONORABLE DAVID P. McDONALD, BANKRUPTCY JUDGE.

If the Appellant-Petitioner was granted Certiorari, it cannot prevail because Appellant-Petitioner has failed to supply sufficient record to support the Appellant's claim attacking the Orders of the Bankruptcy Court and the District Court.

The Appellant-Petitioner argues the Chapter 11 Plan, though confirmed, was not consummated. He then proceeds without evidence or record to attempt to circumvent the Rules here, as well as in the other phases of this case. Appellant-Petitioner attempts to supply without proper evidence or record a claim of

modification of the Plan. The record shows the Appellant-Petitioner was in default and that Appellant-Petitioner's counsel never supplied any modification of the defaulted Plan. The facts show and the Bankruptcy Court found that Appellant-Petitioner was in material default and the Court properly dismissed his Chapter 11 under 11 U.S.C. Section 1112(b)(8).

The Appellant-Petitioner was in default on Court ordered installments of $36,584.60 due January 1, 1988 and $36,584.60 due January 1, 1989. While enjoying the protection of the Bankruptcy Court, Appellant-Petitioner had not accounted to the Court or its creditors for its income and crops. Appellant-Petitioner failed to produce its books, records and documents required by Order of the Bankruptcy Court. After hearing

evidence on September 15, 1987, November 15, 1988 and December 13, 1988, the Bankruptcy Court found that the Appellant-Petitioner was in material default with respect to a confirmed Plan under 11 U.S.C. Section 1112(b)(8) of the Bankruptcy Code. The Court further found that the proposed modifications of Plan by Appellant-Petitioner failed to meet the requirements of 11 U.S.C. Section 1127 of the Bankruptcy Code, that the Revised Modifications of December 11, 1988 and December 13, 1988 were not timely filed within the time fixed by the Court and that circumstances in this case did not warrant such modification. The bankruptcy case was dismissed on December 13, 1988. Appellee held a first Deed of Trust on real estate owned by Appellant-Petitioner.

This property has been foreclosed.

Any reinstatement of a Chapter 11 case could not include the real estate in a modified Plan. The farm was the principal asset of the Bankruptcy Estate. The entire exercise of the Appeals are moot.

Appellant-Petitioner makes much of his contention that the Plan, as confirmed, was unworkable. This is a bald attempt by Appellant-Petitioner to impeach his own Plan. The Debtor had counsel. The Debtor created his own Plan and submitted it to the Bankruptcy Court. Federal Land Bank of St. Louis, as creditor, had no part in developing the Plan which Debtor proposed, and which was confirmed. Appellant-Petitioner fails to point to anything in the record, nor does any evidence exist in the record, which would show the Plan was confirmed under duress or over the objections of the

Debtor. Appellant-Petitioner also fails to point to any evidence, nor does any exist in the record, which would show a viable substitute for the confirmed Plan.

It is hornbook law that an Appellate Court's review is limited to what is contained in the record. Thomson v. Gaskill, 315 U.S. 442 (1942), 4A CJS Appeal and Error, Section 1142 et. seq. Appellant-Petitioner's unsubstantiated assertions regarding the Chapter 11 Plan must therefore fall of their own weight.

In addition, reference to material not included in the Joint Appendix is subject to censure, and inclusion of such information in a Brief even more so. U.S. v. Anderson, 481 F.2d 685 (C.A.W.Va 1973) aff'd 417 U.S. 211 (1974).

The Appellant-Petitioner counsel throughout his Brief has repeatedly

referred to facts which are not in evidence and certainly not before the Court as a matter of record. Those matters, particularly in reference to the items claimed as counsel's excuses for his failures, are not in evidence. Thus they cannot be considered here.

The Appellant-Petitioner mistakenly refers to Federal Land Bank as a governmental entity. This is not correct, it is a private entity.

In addition, the Appellant-Petitioner never presented a coherent modification of the confirmed Chapter 11 Plan. Appellant-Petitioner's statements concerning such modified Plan cannot be a basis for a reversal of the Court of Appeals Affirmation of the District Court's Orders.

Absent a firm showing to the

contrary, there is a presumption that the judgments of the Bankruptcy Court, the District Court and the Court of Appeals are valid. Thompson v. King, 107 F.2d 307 (8th Cir. 1940), Henderson v. Kibbe, 431 U.S. 145 (1977). Appellant-Petitioner has failed to show any evidence that would overcome the presumption that the Decisions of the Bankruptcy Court the District Court and the Court of Appeals are valid. His Brief lists the same excuses as those presented to and ruled on by the Courts below, with no additional showing that would mark the Decisions of those Courts as irregular.

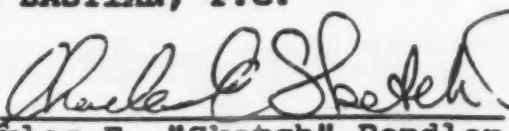
The failure to show any abuse of discretion by the lower Courts or any compelling new standard for excusable neglect gives no basis for a Writ of Certiorari to be granted.

CONCLUSION

The Appellee submits, that the Writ of Certiorari should be denied, as there is no conflict of decisions in this case. In the event a Writ is granted, Appellee respectfully requests that the Decisions of the Court of Appeals be affirmed.

Respectfully submitted,

RENDLEN, RENDLEN, REDINGTON and BASTIAN, P.C.

By: 
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